AN ASSESSMENT OF LEGAL AND ADMINISTRATIVE ARRANGEMENTS RELATED TO PLACER MINING IN THE YUKON RIVER BASIN

by

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March 1984

YUKON RIVER BASIN STUDY

This project was completed for the Yukon River Basin Study, an intergovernmental study funded by the governments of Canada, Yukon and British Columbia.

Project Report :

Socio - Economic No. 5b

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This report was funded by the Yukon River Basin Committee under the terms of "An Agreement Respecting Studies and Planning of Water Resources in the Yukon River Basin" between Canada, British Columbia and Yukon. The views, conclusions and recommendations are those of the authors and not necessarily those of the Yukon River Basin Committee, or the Governments of Canada, British Columbia or Yukon.

This Project Report was completed for Yukon River Basin Study Project 64.

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Other reports to the Yukon Basin Study Committee describe the history of placer mining in the Yukon Basin and record known production since prior to the gold rush through 1982. The section of this report entitled "Legal and Administrative Arrangements for Yukon River Basin Water Management, describes the existing legal and administrative structure and procedures for the regulation of placer mining in both the Yukon Territory and in the British Columbia portion of the basin. This section of the report assesses existing practices in light of criticisms that have been voiced an suggests a basis for resolving problems that have arisen.

We begin with the premise that the general aim of government in its regulation of the placer mining industry is to realize as much benefit as practicable for all interests and the general public - territorial and national - from the resources affected by and used in placer mining. It should be recognized that in searching for the greatest benefit, consideration must include but extend beyond the benefits to placer miners and fishery interests to all other directly affected interests and the general public. This raises a question about what is a benefit and how are benefits measured. Techniques exist and studies have been made to determine the measurable economic (dollar) benefits from placer mining and the costs associated with this activity in the Yukon Territory. We recognize that such studies cover only a part of the picture. In deciding whether a specified activity is worthwhile, Canadians often take into account much more than the measurable economic

returns. Public officials may also weigh such effects as the benefits derived from the maintenance of particular bio-physical and social conditions, the distribution of income, (e.g. as between the Yukon and other parts of Canada or among income classes), and the conservation of resources for the use of future generations. These considerations cannot be readily incorporated into a benefit/cost ratio expressed in monetary terms. This limitation of benefit/cost studies is explicitly recognized in the study by Marvin Shaffer and Associates entitled Benefit Cost Analysis of the proposed "Yukon Placer Mining Guidelines" (May 24, 1983). Consequently the objective of realizing as much benefit as practicable from the resources affected and used in placer mining cannot be pursued only by estimating the monetary benefits and costs of alternative uses of the affected resources.

The problem of arriving at acceptable patterns of resource use is further complicated by the fact that because of differing interests and values, members of the public and public officials will value the same effects differently. One individual may attach great importance to maintaining a stream valley in relatively natural conditions while another individual may attach relatively little importance to the bio-physical condition of such a valley. Similarly a Yukon resident may attach considerable weight to an increase in income to the Yukon whereas a resident of one of the provinces may attach more importance to the income that accrues to other parts of Canada.

Finally, it is not always practicable to make accurate predictions of what the effects of a given pattern of use of resources associated with placer mining will be. Data on the

bio-physical system may be incomplete or the system may not be well understood. Economic and social consequences of use may vary from those expected because of changes in public preferences or changes in national or world economic conditions.

Since the benefits and costs of using resources associated with placer mining cannot be objectively determined, there is a need for a legal, administrative, and political arrangement that balances the preferences of different groups in such a way as to arrive at an allocation and use of these resources that the pubic considers to be fair and equitable. Inasmuch as eventual consequences may depart from those predicted or new knowledge may require a modification in predictions, the institutional arrangements for managing resources associated with placer mining must be flexible enough to adapt to changing conditions and new knowledge.

In the Yukon there has been considerable controversy about how the resources associated with placer mining should be allocated and used. In February 1983 representatives of the Department of Indian Affairs and Northern Development, Department of Environment and Department of Fisheries and Oceans jointly prepared and distributed for discussion purposes a proposed set of Yukon Placer Mining Guidelines, designed primarily to protect fisheries habitat. Controversy sparked by these proposed guidelines led to the appointment by the federal government of a Yukon Placer Guidelines Review Committee which recently completed public hearings and submitted its report entitled Resources, Regulations and Reality: Report of the Yukon Placer Mining Guidelines Public Review Committee 1983. The many dissatisfactions expressed at the public

hearings of the Committee indicate that existing legal, administrative and political arrangements do not elicit widespread public confidence. We will devote most of the remainder of this study to an assessment of that problem. In the British Columbia portion of the basin there evidently is much less dissatisfaction with the functioning of existing arrangements so we will devote only brief comment to the situation in that province.

I. Placer Mining in the Yukon

From our review of economic analyses of placer mining in the Yukon and the briefs that have been submitted to the Yukon Placer Guidelines Review Committee, the following general conclusions are reached:

1. Placer mining makes a significant contribution to the economy of the Yukon.

2. There is broad support in the Yukon for policies that foster the continuance of a viable placer mining industry while at the same time providing substantial protection to the fish, wildlife and recreation resources of the Yukon. The Yukon government, in its submission to the Yukon Placer Mining Guidelines Review Committee, emphasizes the importance of achieving an appropriate balance between placer mining and other resource uses in placer mining areas. This search for balance appears to reflect the views of most interested parties. The problem arises in determining how to achieve that balance.

3. The placer miners and some others strongly believe that the proposed guidelines designed to protect fishery resources together with existing policies and practices would impose costs upon placer mining that are not justified by the value of the fishery resources being protected.

4. Concern exists that insufficient consideration is being given to the current and potential effects of placer mining on the recreation, wildlife and related environmental values associated with areas affected by placer mining.

5. Existing administrative processes and organizational arrangements are inadequate for weighing the differing values attached to competing resource uses and arriving at decisions that the directly affected parties consider to be fair and which the general public regards as serving the broad public interest.

Institutional Deficiencies

The problems and controversies that have arisen over placer mining in the Yukon can be attributed to several basic features of the legal and administrative arrangements for resource allocation and management, including the following:

1. The Placer Mining Act is concerned primarily with defining the rights and obligations of placer miners. It makes no provision for the coordination of placer mining activities with other resource uses.

2. Placer mining is excepted from regulation under the Territorial Lands Act. Although the construction of access routes and the movement of equipment are covered by the Territorial Land Use Regulations made pursuant to this legislation, other land uses are always subordinate to placer mining at placer mining sites.

3. The system of "authorizations" issued by the Water Controller under the Northern Inland Waters Act, as the primary way of granting rights for the use of water resources to placer miners, has been ruled by the Federal Court of Canada to be an illegal delegation to the Controller of the discretionary powers vested by the Act in the Board (The Dene Nation v. The Queen. F.C.C. February 14, 1984). As a consequence, it is now unclear as to how placer mining operations affecting water resources will be regulated in the 1984 season. This matter is treated in more detail in the companion study entitled Legal and Administrative Arrangements for Yukon River Basin Waters Management.

4. The legal validity of using "guidelines" as a basis for granting rights to use water is open to question because "guidelines have no force in law" (Roman, 1983, p. 7).

5. The Fisheries Act and the way it is administered foster a climate of conflict because,

   (a) There is an insistence that all fish habitat must be protected no matter how limited the value of this habitat may be.

(b) Regulations have not been developed and issued as permitted by s.33(4) of the Fisheries Act to govern the extent to which deleterious substances may be deposited in waters as a consequence of placer mining.

(c) The Act involves processes of regulation that are regarded by the miners as arbitrary, since under the Fisheries Act representatives of the Department of Fisheries and Oceans are unable to stipulate in advance of the initiation of placer mining the specific fish habitat protection measures that will be considered acceptable.

(d) No process exists for resolving the strongly held differences that arise between placer miners and those responsible for enforcing the Fisheries Act in a manner that is considered to be both fair and in accord with the overall public interest.

It is not evident that approval of either the proposed guidelines or a modified set of guidelines within the existing institutional framework would resolve the problems that now exist. In view of the controversy that has been associated with the regulation of placer mining, it is essential that basic changes in the existing system be developed and that these changes be arrived at through a process which will elicit the confidence of the general public and the parties directly affected.

Modifying Institutional Arrangements for Regulation of Placer Mining

In our judgement a constructive attack on this controversial matter will require a mediated negotiation process involving representatives of the placer miners, the fishery interests, conservation interests, the Yukon government, federal agencies and members of the general public who have indicated a concern about this problem. Faithful adherence to the three elements of this proposed process -- negotiation, mediation, and representation of interests -- are critical to its success.

The Yukon Government in its Summary Statement to the Review Committee proposed that a task force composed of representatives of various interests be established by the Minister of Indian Affairs and Northern Development "to thrash out a consensus on how the placer mining industry should be regulated and the content of iterim guidelines." In a somewhat similar vein the Yukon Conservation Society in its final argument proposed that a paper be prepared outlining the options for dealing with suspended solids and that this paper be circulated for reaction and an exchange of views among the interested parties as well as comment. These two proposals appear to reflect a recognition of the need for a process that involves direct interaction among the concerned parties before a final decision on regulatory arrangements is made. Any less involvement by the concerned parties will result in charges of arbitrary decision-making by government. In its report, Resources, Regulation and Reality, the Review Committee recognizes the need "in the longer term" for a "thorough review of all legislation governing placer mining" (Recommendations, p. vii).

Effective negotiation requires that the negotiators perceive that the results of the negotiation will determine the action that is taken. They must believe that the effort negotiation requires and the possible compromises that may be necessary to reach agreement are worthwhile. If negotiators believe that the results of negotiation are unlikely to determine what is done they will be motivated to be intransigent in their respective positions.

In view of the climate of controversy associated with placer mining in the Yukon, the process of negotiation will require mediation by a neutral party. The mediating individual or body must not endeavour to influence the substantive results of the negotiations or be perceived by the negotiators as endeavouring to influence results. The role of mediation must be to facilitate communication among the parties -- i.e. to help them understand each others position and the reasons therefore -- and to suggest alternative solutions for the negotiators to examine which they might not perceive by themselves because of adherence to entrenched positions.

For the results of the negotiation process to be publicly and politically acceptable it must represent a full range of affected interests. It must not only include the directly affected parties who will be the active negotiators, e.g. the placer miners, the fishery interests, and government agencies, but it also must include one or more individuals who reflect a more general civic viewpoint as monitors of the bargaining process. Individuals representing directly affected interests must be able to speak authoritatively for those interests. Negotiators must also have

approximate equality in their ability (a) to devote time to the negotiating sessions and (b) to produce and analyze pertinent information. This may require some government financing to those groups that have limited staff and financial resources.

Major Elements of an Acceptable Regulatory Arrangement

We do not presume to predict what the results of the recommended negotiating process might be. Yet the main features of an arrangement that is likely to be acceptable to the various parties and the general public can be discerned from a review of existing institutional arrangements and the briefs submitted to the Yukon Placer Mining Guidelines Review Committee. It appears to us that an acceptable arrangement would include the following features:

1. The actions required of placer miners to protect water and associated resources for other uses should take into account not only mineral and fishing values but all resource values affected (e.g. wildlife and recreation) as well as differing conditions that exist in various stream valleys.

In order to realize maximum values from the use of land and water resources in areas affected by placer mining the effects of placer mining upon the values that can be realized from other resources must be weighed and the results of such a comparison must be reflected in the constraints placed upon placer mining and other resources uses. Since placer mining values, the physical and biological effects of placer mining, and the values associated with other resource uses vary among stream valleys and even among

reaches of the same valley, the regulatory process must take into account these differences. In some cases, the predominance of values associated with other resource uses may require that certain stream valleys or portions of them be temporarily or permanently withdrawn from placer mining activities. The widely held view is that a stream classification system is the best way of dealing with this problem. It is not self-evident that this is the best arrangement because it could result in a very large number of categories.

It seems possible that a system might be devised which would identify the features of a stream or a reach and associated resources that should be taken into account in arriving at governing standards. These features would include factors such as size and species of fish populations, likely value of placer mining, geological conditions that determine practicability of controlling sediments, recreation and scenic values, and wildlife values. Rules would then indicate how each of these features individually and in combination would be weighed to arrive at the standards for a specific stream or reach. We do not know whether this approach is practicable as an alternative to a stream classification system but the possibility of problems arising from a simple classification system has led us to conclude that alternatives warrant careful consideration.

2. <u>In determining the amount of protection that is to be afforded the resources and resource uses of a specific area, an effort should be made to assess the different kinds of values that people consider to be important</u>.

As previously noted, Canadians weigh a wide range of values when deciding public policy and do not limit themselves to economic efficiency considerations. Therefore, placer mining policies and practices should take into account the range of values that Canadians, and particularly Yukon residents, consider to be important. Such matters as the distribution of income between the Yukon and other areas, the provision of employment opportunities and the conservation of resources for the benefit of future generation should be considered.

3. A system for determining the standards and rules to be applied should be expressed in legislation or regulations t avoid legal complications.

This feature is necessary in order to be assured of the legal validity of the basic regulatory framework. The existing legal basis for regulatory placer mining activity is found in the Yukon Placer Mining Act, the Fisheries Act, the Northern Inland Waters Act, and the Territorial Land Act. Regulations under these statutes must be established by the Governor in Council (See Regina v. Tenale et al.). In order for a coordinated set of regulations to be developed, a single organizational entity should be responsible for coordinating their design and recommending them to the appropriate ministers who in turn would submit them to the governor in Council for approval and issuance. When the regulations are issued, they could be applied by the Territorial Water Board or some other quasi-judicial body which has legal authority to take into account a wide range of public interest considerations when imposing terms and conditions on licensees.

This procedure would parallel existing procedures for regulating fishing in inland waters in provinces like Ontario and British Columbia. In these cases the appropriate provincial minister develops proposed regulations and recommends them to the federal Minister of Fisheries and Oceans for enactment under the Fisheries Act. They become effective upon approval by the Governor in Council and publication in the Canada Gazette. In the case of placer mining in the Yukon it would be necessary to develop a procedure for coordinating the development of the regulations so as to involve at least three federal ministers who have responsibility for administering the basic legislation. These three ministers should agree to assign the responsibility for developing coordinated regulations to a single entity which we will refer to as the regulation development body. Candidates for this role could be:

a. The Department of Renewable Resources of the Yukon Territorial Government.
b. A task force composed of representatives of the three departments and the Yukon Territorial Government.
c. A field office of one of the Departments such as district office of the Environmental Protection Service or a field office of the Department of Fisheries and Oceans.

4. The rules and standards governing placer mining activities to be recommended for issuance by the Governor in Council by the regulation development body should be arrived at through a mediated negotiation process of the type previously described.

We have concluded that it will be essential to follow such a process because of the extreme differences that exist in the case of placer mining as to what is an appropriate balance among competing values. It would have to be a continuing process because it seems unlikely that a comprehensive set of regulations could be devised at the outset and because it will be necessary to have regulations revised from time to time as improved information about resource use values and the effects of placer mining are gained.

5. Decisions in specific cases with regard to the application of standards and rules contained in regulations governing placer mining practices (e.g. the granting of licences and authorizations) should be made by a body composed of individuals capable of operating in a quasi-judicial fashion.

This would require an explicit delegation of authority to such a body by the Ministers responsible for administering the legislation or by the governor in council in accordance with statutory provisions allowing the delegation. If delegation is not provided for, new legislation would be necessary. If the quasi-judicial body is the Yukon Territory Water Board, it would need to be given delegated authority to apply rules and standards not covered by the Northern Inland Waters Act.

This feature also envisages that the responsibilities now exercised by the Water Controller be made subject to supervision by the quasi-judicial board. The Water Controller could function as an individual examiner whose decisions would normally be accepted

as final but would be subject to appeal to the board on important issues. This practice would be consistent with the evident intent of the Northern Inland Waters Act and would unify responsibility for granting rights to water use.

It is important that the decision-making body not be composed of representatives of agencies or interest groups. It is believed that a small board or commission (3 to 5 members) should have decision making responsibility rather than a single individual so as to avoid the possibility that the personality or perceptions of a single person will have a major influence on the decisions that are made. This would appear necessary in order to give the public confidence that decisions reached are fair and equitable.

6. The established operating standards and rules for a stream valley or reach should be subject to reconsideration after a suitable period (e.g. one year) if there is substantial evidence that their effects had been inaccurately estimated or that conditions have significantly changed since the operating standards and rules were adopted.

This principle is suggested because of a recognition that knowledge about the conditions in individual stream valleys is limited. It is quite likely that in some cases conditions will differ substantially from estimates based on information available at the time that operating standards and rules are intially adopted. Furthermore, conditions and values may change over time. It is essential, therefore, that the system be sufficiently flexible to take into account inaccuracies in initial estimates and

changed conditions. One can envisage changes and additions being considered each winter after the close of a placer mining season. These changes would take into account experience and new information gained during the previous year.

Obstacles to the Implementation of Acceptable Arrangements

First, as previously noted, existing law does not require consideration of a full range of values in the regulation of placer mining operations. Placer mining is excepted from regulation under the Territorial Lands Act, although the construction of access routes and the movement of equipment over Crown lands can be regulated. While it would be desirable to amend existing legislation to permit regulation of the placer mining operation itself, a substantial degree of control in the interest of a wide range of values can be achieved through the regulation of access and the regulation of water use.

Second, the Fisheries Act permits subordination of all other uses to the protection of fisheries habitat. As the law has been interpreted, it is required that fisheries habitat be preserved even though the fisheries values may be less than the values of other uses that potentially could degrade fishery habitat. It is this practice that gives rise to the charge of placer miners that existing and proposed regulatory practices often require them to engage in operating practices that involve costs which are far in excess of the value of fishery resources that might be adversely affected.

The report of the Commission on Pacific Fisheries Policy recognizes this problem and proposes policies and procedures for dealing with it. The Commissioner supports a policy that would ensure that "the total fish production capacity in the region will not be diminished as a result of industrial and other activities that impinge on fish habitat". He goes on to recommend that if measures undertaken by a developer

> "are insufficient to prevent habitat damage, the Department [of Fisheries and Oceans] should be authorized (but not required) to approve the development, but only if the loss in fish production capacity is fully compensated through increased fish production capacity elsewhere. The compensation should take the form of new fish production capacity created by the developer, or cash sufficient to enable the Department to replace the equivalent of the lost productive capacity".

In other words, where fishery habitat values are quite small in comparison with placer mining values, the placer miner, instead of engaging in costly habitat protection measures, would be able to make a cash payment to be used for replacement of the lost productive capacity. The revenues so realized could be used for habitat enhancement in areas more suitable for fish habitat.

This policy has some very fundamental problems. One arises from the difficulty of arriving at acceptable estimates of the value of fishery resources destroyed. In order to determine the amount of cash payment does one estimate the cost of replacing the habitat being destroyed or the value of the fish lost? In the former case, it is likely that this replacement cost would often exceed the net value of placer mining. In the latter case, if only

the commercial value of the fish was taken, the fishery habitat value would almost invariably be very small in comparison to placer mining values. What should be done about the 'other' values associated with the fish loss? A second problem is determining what is effective replacement of lost productive capacity. Simply producing more hatchery fish is proving not to be a panacea. Also, there are many uncertainties in discerning what constitutes 'better' habitat' will alternative areas chosen to replace destroyed habitat really prove to be as suitable for fish production? These two examples are presented simply to illustrate the many problems associated with such a 'no net-loss' policy.

Section 33 (13) of the Fisheries Act authorizes the Governor-in- Council to make regulations that prescribe "the waters or places or classes thereof where any deleterious substances or classes thereof ... are authorized to be deposited". It is therefore possible for regulations to be adopted which would permit placer mining to impair fishery values at locations where placer mining values exceed fishery values.

Third, under existing legislation approval by the Department of Fisheries and Oceans of a water use plan proposed by a placer miner and faithful implementation of the plan can still result in the miner being liable to prosecution under the habitat protection provisions of the Fisheries Act. The Commissioner on Pacific Fisheries Policy points out (page 28) that:

> "These arrangements leave operators in a constant state of uncertainty; even though their activities may have been endorsed by habitat protection officials, they remain potentially vulnerable under the Fisheries Act."

This uncertainty makes it difficult for fisheries officials and placer miners to operate in an atmosphere of mutual confidence in the integrity of the understandings that are reached.

The Commissioner on Pacific Fisheries Policy proposes changes in the Fisheries Act that would enable developers

> "to proceed without being liable to prosecution as long as they comply with...[the] terms and conditions of approved operating arrangements".

He goes on to propose that the Department should be empowered "to curtail or suspend operations if fish habitat is significantly damaged or threatened by events that were unforeseeable at the time the approval was granted". We believe that adoption of the Commissioner's recommendation would help to foster better relations between placer miners and DFO officials in the implementation of practices to protect fishery resources in the Yukon. If adopted, this recommendation would enable the Department of Fisheries and oceans to negotiate with miners and other government departments to achieve a binding agreement as to acceptable standards and rules regulating placer mining activities.

Fourth, since the Department of Fisheries and Oceans has clear responsibility for habitat protection under the Fisheries Act a question arises as to whether, in the absence of new legislation, responsibility can be given to another body not responsible to the Minister of DFO (e.g. the Yukon Water Board or other quasi-judicial body) to authorize or license water uses in a way that would be

binding on the Department. However, section 33(13)(f) of the Fisheries Act clearly authorizes the Governor in Council to prescribe "the persons who may authorize the deposit of any deleterious substances or classes thereof...and the conditions or circumstances under which and requirements subject to which such persons may grant such authorization". Therefore, there appears to be no reason why authority to implement regulations to protect fishery resources approved by the Governor in Council could not be delegated to a quasi-judicial body in the Yukon.

Fifth, the Northern Inland Waters Act (NIWA) provides for a body (the Water Board) to be primarily responsible for water allocation decisions. The Review Committee's report, Resources, Regulations and Reality supports this role for the Water Board (Recommendations, p. vii). This body is composed of members who tend to be regarded as representatives of particular interests rather than as individuals who can function in an even handed way with regard to the issues that come before them. Three of the members of the Water Board are representatives of government agencies and in the past at least some members nominated by the Commissioner in Council of the Yukon Territory have been viewed as representatives of particular water user interests.

We believe it would be desirable to remedy this situation by emphasizing the quasi-judicial nature of the Water Board and by restricting its membership to non-government persons. Ideally those appointed should not be engaged in business or other types of activity that would cause them to be regarded as supporters of particular interests.

In making provision for such a body it would be necessary to relate it in an appropriate fashion to the integrated resource planning and management process that has been adopted for the Yukon. We believe that serious consideration should be given to having a single integrated system for granting permission and specifying the conditions of use for land and water resources. Consequently, the role of the Water Board should be linked with the land use planning responsibilities of the Land Use Planning Commission to be established under the new Land use Planning Process (see companion study on Land Use Planning for details) and with the permitting process under the Territorial Land Use Regulations.

This examination of the regulation of placer mining in the Yukon indicates that the first step in arriving at a regulatory process which avoids the difficulties and controversies now being encountered is for all interested parties to be involved in negotiating an understanding of how existing regulatory processes should be modified in order to make them widely acceptable. Such negotiations could be facilitated by a neutral mediating individual or body. Our examination then suggested certain basic features that a regulatory process should have in order to be widely acceptable. Implementation of these features could encounter obstacles arising out of existing legislation and the way such legislation has been implemented. Our review concludes, however, that for the most part, existing legislation would not prevent the inclusion of the features proposed.

II. Placer Mining in British Columbia

We have discovered no significant criticisms of procedures and practices for administering placer mining activities in Northwest British Columbia. The "one window" approach whereby applications for permission to placer mine require a single application form that is acted upon by all agencies seems to be working well. Concern has been expressed about the limited data available to arrive at the colour codings used to categorize streams and reaches.

While existing procedures including the "one window" approach and the stream classification system may be partly responsible for the lack of controversy, the relatively limited effects of the small amount of placer mining underway in Northwestern British Columbia may be an important factor. In addition since salmon resources are not affected by placer mining in this portion of the Yukon Basin, fishery resource protection is not accorded as much emphasis as in the Yukon. Also, placer streams flow into lakes which serve as sediment traps and limit downstream effects. Finally, neither the placer mining interests nor conservation groups are as well organized in this portion of the Basin as in the Yukon.

It should be recognized that regulatory processes in British Columbia are subject to some of the same limitations as those in the Yukon. The stream classification system is based on fishery values and does not take into account other resource values. The

classification system itself is crude and does not appear well suited to take into account a wide-range of physical and biological conditions and differing mineral and other resources values. If conditions changed in the area so as to threaten resource values of particular concern to well organized and articulate groups, difficulties could arise that would be similar to those experienced in the Yukon Territory.

Since the existing system is meeting with little objection at the present time, we see no point in examining the situation in detail. Any detailed examination of the regulatory process for placer mining in the British Columbia portion of the Yukon Basin could more appropriately be undertaken as part of a study of placer mining in the province as a whole.